90-104

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOHN M.,

PETITIONER

-v-

PAULA T.,
and
MICHAEL T.,

RESPONDENTS

ANSWER TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

ANSWER TO PETITION FOR WRIT OF CERTIORARI

CHESTER P. CONFER, ESQUIRE
Counsel of Record for Paula T.
112/114 N. Plum Street
Media, Pennsylvania 19063
(215) 566-6810

SCOTT D. GALLOWAY, ESQUIRE
Counsel of Record for Michael T.
1215 W. Baltimore Pike, Suite 14
Media, Pennsylvania 19063
(215) 891-0500

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SUMMARY OF ARGUMENT

The Petitioner herein has raised Consitutional issues which have previously been addressed by the Pennsylvania Supreme Court. At the core of these issues is the question of whether the Respondent-Husband must submit to blood tests to prove he is the biological father of the child, born while he was married to the child's mother, thereby creating a presumption of legitimacy.

(1) The Petitioner's first

contention is that he has "good cause" to compel Responent-Husband to submit to a blood test. His contention is based on Pa.R.C.P. 4010 (a), a discovery rule, which is an explanatory note which speaks to the issue of "good cause." Pennsylvania has patterned its Rules of Civil Procedure after the Federal Rules and accordingly, this Honorble Supreme Court has addressed the "good cause" requirement in Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). Respondent-Husband contends that the presumption of legitimacy

is in fact enough to protect the undue invasion of his rights to privacy and therefore, no "good cause" exists which would require him to submit to blood testing.

In addition, it is Petitioner's mistaken belief that a husband may be compelled to submit to blood tests. Nowhere in The Uniform Act on Blood Tests as adopted in Pennsylvania, 42 Pa.C.S.A.§6131 et seq., specifically section 6133, is there mention of a husband or a presumed father being compelled to submit to blood tests.

(2) The Petitioner's second

contention is that an artificial barrier has been created which precludes him from litigating his claim, regarding his interest in a child born to a woman married to another. Respondents believe this contention to be without merit, since Pennsylvania's Courts have heard and ruled on the Petitioner's claims.

(3) The Petitioner's third contention is that his Constitutional guarantees of procedural and substantive rights to due process and equal protection have been violated by the Court's failure to order the

Respondent-Husband to undergo blood tests. The Petitioner is once again in error. The presumption of legitimacy is a strong one in Pennsylvania and absent the proof of facts required to rebut that presumption, the Petitioner has no standing. In addition, this Honorable Supreme Court considered these issues in Michael H v. Gerald D., U.S. , 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), reh den. U.S. ,110 S.Ct. 22, 106 L.Ed.2d 634 (1989), and found no violation of such Constitutional rights.

(4) The Petitioner's fourth

contention is to question whether the presumption of legitimacy is so strong as to preclude a third party outside of the marriage, from challenging a husband's claim to parentage. This issue was addressed by the Pennsylvania Supreme Court in John M. v. Paula T. and Michael T., 571 A.2d 1380 (1990) and by this Honorable Supreme Court in Michael, supra. The answer was an affirmative one.

(5) The Petitioner's fifth and final contention is that his Constitutional guarantees of procedural and substantive rights to due process

and equal protection were violated due to estoppel cases not being applicable. Respondents believe that this is not the case, in that the decisions rendered were done so based upon the Petitioner's failure to meet his burden of proof.

ARGUMENT

The Pennsylvania Supreme Court has addressed the Consitutional issues which the Petitioner herein has raised. In John M. v. Paula T. and Michael T., Pa. , 571 A.2d. 1380 (1990), the Court stated:

> The right of any person to question paternity is not without limitation and must be considered along with the rights of the person whose blood sample is sought. The right of privacy of each individual is protected by the Constitution of the United States and by this Commonwealth. John M., 571 A.2d at 1385.

1. Petitioner contends that his standing to litigate a claim that he is the biological father of a child born to a woman while she is married to another bestows the additional right to compel Respondent-Husband to submit to a blood test when good cause is shown.

Petitioner's contention is without merit for two reasons:

(1) The determination for "good cause" is left to the discretion of the Court as found in Pa.R.C.P. 4010 (a) as follows:

(a) When the mental or physical condition (including blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the Court in which the action is pending may Order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The Order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. [emphasis added]

The explanatory note to Pa.R.C.P. 4010 states, "Good cause... is intended to protect the parties against undue invasion of their right to privacy." Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964), interprets the good cause requirement of Federal Rule of Civil Procedure No. 35 after which Pennsylvania Rule of Civil Procedure 4010 is modeled. The Court in Schlagenhauf stated:

> They [controversy and good cause] are not met by mere conclusory allegations of the pleadings - nor by mere relevance to the cause - but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination...The ability of the movant to obtain the desired information by other means is also relevant. Schlagenhauf, 85 S.Ct. at 242, 243.

Where a husband is living with his wife, is never separated from her, is the undisputed father of her first child, was having sexual intercourse with his wife three to four times a

week when her second child was conceived, was at the hospital and took part in the delivery of the second child, considers himself to be the natural father of both children, and husband and wife and children are living together in community as a family unit, it certainly is an undue invasion of the husband's right to privacy to order him to take a blood test in proceedings commenced by a person who is alleging that person is the father of the wife's second child.

The requirement of showing good cause is therefore for the protection

of the husband. Petitioner has been given every opportunity to establish good cause. His attempt to establish a showing of good cause has been found inadequate by the Trial Court and the Supreme Court of Pennsylvania. Moreover,

(2) Pennsylvania Law in no way allows the husband to be compelled to submit to blood tests. The Uniform Act on Blood Tests as adopted in Pennsylvania, 42 Pa.C.S.A.§6131 et seq. speaks clearly as to whom may be compelled to undergo blood testing. Section §6133 states that the Court shall Order the mother, child and alleged father to submit to blood

tests. There is absolutely no mention of husband. Furthermore, Pennsylvania has clearly differentiated between a "presumed father" and an "alleged father", in Burston v. Dodson, 257 Pa.Super.1, 390 A.2d 216 (1978) stating:

> ...a husband with possible access to his wife must be considered the "presumed father" and not the "alleged father"... Burston, 390 A.2d at 220, n.10.

The Laws and Courts of Pennsylvania are consistently clear on the issue of who may be compelled to undergo blood tests. In Burston, the Court determined that not only may the husband with

"possible access" refuse to submit to blood tests but the Trial Court may not consider such failure to submit to such a test due to the strong presumption of legitimacy that prevails. Burston, 390 A.2d at 220, n.10.

Petitioner's contention that Burston is inapplicable as it predates Pa.R.C.P. 4010 (a) (1979) is also without merit as Petitioner's own case, argued in his favor, Williams v. Milliken, 506 A.2d 918, 923 (1986) later proceeding 2 Pa.D.&C. 4th 263 (1989), cites to Burston in its discussion of evidence necessary in such cases as the one now

before this Honorable Supreme Court. In addition, Pennsylvania's Supreme Court, in rendering their decision in the case at bar, relied on Burston.

The burden of proof remains upon Petitioner. The husband is, and always has been, presumed to be the father. Connell v. Connell, 329 Pa. Super.1, 477 A.2d 874 (1984). The time honored presumption of legitimacy is paramount under Pennsylvania Law.

2. Petitioner contends that the Pennsylvania Courts have in some way created an artificial barrier to litigation of his interest in a child born

to a woman married to another. Petitioner's contention is without merit as the Courts of Pennsylvania have allowed Petitioner to litigate his claims in every way consistent with the Laws of the Commonwealth.

3. Petitioner further contends that his Consitutional guarantees of procedural and substantive rights to due process and equal protection are violated by the Court's failure to Order the husband to undergo blood testing. Petitioner's contention is without merit as he has been allowed every opportunity to prove his contentions under Pennsylvania

Law.

The Case Law in Pennsylvania is eminently clear as to the effects of the presumption of legitimacy. The presumption of legitimacy is still one of the strongest known to the Law and can be overcome in Pennsylvania only by proof of facts establishing (a) non-access of (b) that the husband is impotent or (c) had no sexual intercourse with his wife at the time when it was possible in the course of nature for the child to be born. In order to successfully rebut the presumption of legitimacy, the evidence of non-access or lack of

sexual intercouse or impotency must be clear, direct, convincing and unassailable. Commonwealth ex.rel. O'Brien v. O'Brien, 182 Pa.Super. 584, 128 A.2d. 164, aff'd. 390 Pa. 551, 136 A.2d 451-453 (1957). See also: Commonwealth ex.rel. Ermel v. Ermel, 259 Pa.Super. 219, 393 A.2d 797 (1978) later appr. 297 Pa.Super. 508, 441 A.2d 763 (1981), later appr. 322 Pa.Super. 400, 469 A.2d 682 (1983); Cairgle v. American Radiator Standard Sanitary Corporation, 366 Pa.Super. 249, 77 A.2d 439 (1957).

Petitioner did not prove or come

close to proving non-access or impotency of the husband. In this instance, both Respondent-Mother and Respondent-Father testified that Respondent-Husband had access to the wife during the time in which Heather T was conceived. The testimony of Respondent-Husband indicated that during the relevant time of conception in December of 1980, January of February of 1981, he and his wife, Respondent-Mother were having sexual intercourse at least three or four times a week. (Notes of Testimony 157 to 159a). In addition, there was absolutely no evidence presented by Petitioner that Respondent-

Husband did not have access to his wife or that there was an absence of sexual relations during the time of coverture. Finally, there was absolutely no evidence, nor could there be, that Respondent-Husband was or is impotent.

Petitioner's claim that only a blood test may overcome the presumption of legitimacy is further defective in that HLA Blood Tests are relevant but are not conclusive. Connell v. Connell, 329 Pa.Super.1, 477 A.2d 872, 875 (1984). Testimony at the Trial Court concerning the HLA test indicated that the probability of the Petitioner being the

father of the child is 97.471%. Dr. Sherwood testified that this percentage is:

> ...based on the value, evaluating a large number of paternity tests in which the alleged father was not excluded, in our experience this is perhaps in the mid-range of result that one gets in this type of testing. (R.17).

The testimony concerning mid-range makes a finding of 97.471% unimpressive. Such a finding is mid-range only and does not overcome nor come close to overcoming the presumption of legitimacy.

Further evidence was also presented in the determination of paternity by

the Court. The Trial Judge observed the photograph of the child and the physical features of Petitioner, John M. and Respondent, Michael T. In comparing the features of the three, the Trial Judge was unable to conclude that the child in question resembles Petitioner more than Respondent, Michael T.

The Judge also considered the credibility of all witnesses. The trier of fact may accept some of a witness's testimony as being the truth and disbelieve other testimony of the witness. Burston, 390 A.2d at 222. As between Petitioner and Respondent-Mother, Paula T.,

the Trial Judge found Respondent, Paula T. to be more credible than the Petitioner. (Lower Court opinion, p. 17). Respondent, Michael T. was found to be an extremely credible witness. (Lower Court opinion, p. 17). The finder of fact believed both Respondents as to their testimony that they had sexual intercourse during the time of possible conception of the child in question.

Thus, the Trial Court allowed and considered the evidence and testimony offered by Petitioner and found it lacking. Petitioner's guarantees of procedural and substantive rights to due process and

equal protection were in no way mitigated by the Courts. Again, the burden of proof was upon Petitioner to prove (as is consistent with established Pennsylvania case law):

(a) non-access or
(b) impotency or
(c) lack of sexual contact

Petitioner offered no such proof and has failed to meet the standard for rebuttal set by Pennsylvania.

Petitioner's contention of violations of procedural and substantive rights to due process are also seen to lack merit under the decision rendered by this Honorable Supreme Court in

Michael H. v. Gerald D., U.S. , 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), reh den. U.S. , 110 S.Ct. 22, 106 L.Ed. 2d 634 (1989). While Petitioner urges that the differences in fact pattern distinguish his case and makes Michael non-controlling, Respondent respectfully submits that the issues of procedural and substantive rights in cases involving "alleged" unwed fathers challenging paternity in cases wherein a child is conceived and born during wedlock have already been determined. In Michael, this Honorable Court considered such issues in detail and found no violation

of procedural and substantive rights even when a state fails to allow standing for such a claim at all. In addition, it is significant that in a footnote in Michael, the following was said concerning California law:

> In those instances in which California allows a natural father to rebut the presumption of legitimacy of a child born to a married woman, e.g., where the husband is impotent or sterile, or where the husband and wife have not been cohabiting, it is more likely that the husband already knows the child is not his and thus, less likely that the paternity hearing will disrupt an otherwise harmonious an apparently exclusive marital relationship. Michael, 109 S.Ct. at 2340, n.1.

Thus, California's standard of rebuttal as understood by this Honorable Supreme Court in Michael appears to be that of Pennsylvania:

> (a) non-access
> (b) impotency (or sterility)
> (c) lack of sexual contact

This Court in Michael declined to find any violation of procedural rights and stated that:

> ...the conclusive presumption [of California Evidence Code §621] not only expresses the State's substantive policy but also furthers is, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy. Michael, 109 S.Ct. at 2340.

The Court then turned to the issue of substantive rights and stated:

> What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within and born into an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made. Michael, 109 S.Ct. at 2344.

The Court in Michael also looked to the issue of the best interests and rights of the child and concluded:

> Under California Law, Victoria [the child] is not illegitimate, and she is treated in the same manner as all other legitimate children. She is entitled to maintain a filial relationship with her legal parents. [emphasis added].Michael,109 S.Ct. at 2346.

The decisions of the Trial Court and the Supreme Court of Pennsylvania are wholly consistent with this Honorable Court's decision in Michael. The integrity of the family outweighs any perceived rights of those standing outside the family unit.

4. Petitioner futher questions:

> Whether the "presumption that a child is born of the marriage" is so strong that a third party who stands outside the marital relationship should not be allowed, for any purpose, to challenge the husband's claim of parentage; as per the concurring opinion joined in by all of the Supreme Court of Pennsylvania Justices in John M. v. Paula T. and Michael T., 571 A.2d at 1389.

Respondent-Husband submits that this Honorable Supreme Court has, again, already considered such an issue and found in the affirmative for the State of California and against the challenging or alleged father outside of marriage:

A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not. In this respect, there is no difference between a rule which says that the marital husband shall be irrebuttably presumed to be the father and a rule which says that the adulterous natural father shall not be recognized as the legal father. Both rules deny someone in Michael's situation, a hearing on whether, in the particular circumstances of his case, California's policies would best be served by giving him parental rights. Thus, as many comment-

> ators have observed... our "irrebuttable presumption" cases must ultimately be analyzed as calling into question not the adequacy of the procedures, but like our cases involving classification framed in other terms... the adequacy of the "fit" between the classification and the policy that the classification serves... We therefore reject Michael's procedural due process challenge and proceed to his substantive claim. Michael, 109 S.Ct. at 2340.

Thus, it is within the powers of the States to promulgate rules tantamount to "conclusive presumptions" in cases such as Michael and the very similar case of John M. v. Paula T. and Michael T. now before this Honorable

Court. The Supreme Court of Pennsylvania has rightfully decided just so, and is wholly consistent with precedent as put forth by this Honorable Court in Michael.

5. Petitioner's final contention is that Constitutional guarantees of procedural and substantive rights to due process and equal protection were violated due to estoppel cases not being applicable. Petitioner's final contention is without merit as the Court's decision was not based on estoppel cases, but on Petitioner's failure to meet his burden of proof, which is clear under

Pennsylvania case law as discussed above in numbers one (1) and three (3).

CONCLUSION

Respondents respectfully submit that Petitioner's contentions of violations of procedural, substantive or equal protection are without merit. All questions presented have been addressed in the factually similar case of Michael H. v. Gerald D. as decided and expressed in the opinion of the Honorable Justice Scalia. Pennsylvania has allowed the Petitioner access to the Courts to litigate his claim and has acted consistent with all procedural and substantive

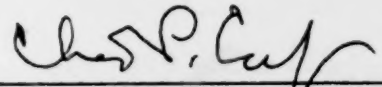
rights under the Constitution and case law.

Even shortly after this great nation came into existence, it was recognized that in the case of conflicting presumptions on the suject of legitimacy, the presumption of legitimacy must prevail. Senser v. Bower, 1 P&W 45 (1830); Dennison v. Page, 29 Pa. 420 (1857). This doctrine still stands in the State of Pennsylvania. The Courts in Pennsylvania honor the preservation of the sanctity of the family in a society in which the family is a fundamental unit to bring about good morals and

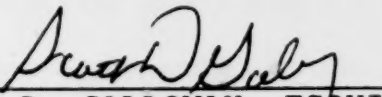
public decency. Commonwealth ex rel. Goldman v. Goldman, 199 Pa. Super. 274, 184 A.2d 351 (1962).

Petitioner has had his day in Court and was given every opportunity to rebut the presumption of legitimacy that was established due to the Commonwealth of Pennsylvania's interest in strengthening family life and affording legitimacy to children. Petitioner has failed to meet his burden of proof and Respondents should now be granted the privacy and autonomy now so long missing in their lives.

Respectfully submitted:



CHESTER P. CONFER, ESQUIRE
Attorney for Respondent
Paula T.



SCOTT D. GALLOWAY, ESQUIRE
Attorney for Respondent
Michael T.